IN THE

United States Supreme Court

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL.,
Plaintiffs in Error,

vs.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER AND THEIR DEPUTIES, SUBORDINATES, AND ASSISTANTS,
Defendants in Error.

No. 440

REPLY BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

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STATEMENT.

The brief of the plaintiffs in error in Meyer vs. State, No. 325, discusses questions very similar to those involved in the instant case. The law involved in the Meyer case was passed in 1919. The supreme court of Nebraska in Nebraska vs. McKelvie, 104 Nebr. 93, held that act constitutional. By construction, the court eliminated the objectionable parts of the act. The legislature of 1921 repealed the 1919 act and passed the act that is involved in the instant case. The objections made to the constitutionality of the act of 1921 apply with equal force to the act of 1919.

WAR RESENTMENT.

The quotations from the laws of the various states which are reproduced in the state's brief, beginning on page 25, show that practically all of this language legislation was passed in 1918 and 1919. The purpose of practically all of these laws is to regulate the study of foreign languages. Very few states have attempted to prohibit the use and study of foreign languages. Language prohibition is an aftermath of the world war. It is the result of war resentment. *It is not based on any substantial or well defined reason. It is not "put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare."* Noble State Bank vs. Haskell, 219 U. S. 104, 111; 55 Law. ed. 112, 116.

Following the Revolution, some of the colonies passed laws for the purpose of confiscating the property of the Tories. The records of this court show that following the Civil War there were many efforts made to over-reach the rights of citizens by passing legislation that denied those who sided with the confederacy the rights guaranteed to them by the constitution. It was war resentment that caused our colonial ancestors to attempt to unconstitutionally discriminate against the Tories. It was war resentment that caused the enactment of the bills of attainder, ex post facto laws, and the bills of pains and and penalties that immediately following the Civil War.

During the world war it was necessary to stimulate the latent patriotism of our people. We not only developed the patriotism of our own country, but we also developed

resentment and hatred towards those with whom we were fighting. On every street corner, earnest and zealous men and women denounced "the Huns," and all others who were associated with them in the war. Prejudice, war resentment and hatred were unavoidable. This resentment was particularly strong as against the Germans . Before the war "Made in Germany" was a valuable recommendation in commerce. Since the war, it is necessary to conceal that fact.

The act in question is admittedly aimed at the German language. The state's brief admits that those who were effected by it are persons of either German birth or descent. The purpose is to prevent our children from learning German, or other foreign languages, at the time in life when it is most easy for them to do so. The whole theory of the law is one of retaliation. It has the effect of a bill of attainder on those who happen to use a language other than English in their home. In passing this retaliatory measure against the Germans, the fact is overlooked that it similarly effects the rights of the twenty-nine other nationalities who live in Nebraska and who either were born in continental Europe, or are the descendants of those who were born in continental Europe. The act in question outlaws the languages of all the people in Nebraska who come from continental Europe.

This court has held that no matter what the form of the legislation may be, if in its operation it has the effect of violating the constitution it is invalid. In many opinions, it has recognized the circumstances and conditions that have surrounded and induced legislative action. The fact that there is war resentment creates an atmosphere

in which the constitutional rights of a part of our citizens may be disregarded. One of the prime purposes of our constitution is to protect minorities in times of stress and excitement against outbursts of ill-will, intolerance and prejudice, as is illustrated by the following cases:

In Cummings vs. Missouri, 71 U. S. 277, 18 Law ed. 356, the question under consideration was the constitutional provision adopted by the state of Missouri, which attempted to deny those who had sided with the confederacy the right to teach school. In the opinion, Justice Field said on page 320:

> "The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact * * * "

And on pp. 321 and 322 he said:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all

avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

"Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being, in effect, punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

"The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendancy in that state during the recent Rebellion between the friends and enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present Constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the Convention held its deliberations.

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In Fletcher vs. Peck, 6 Cranch, 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feeling of the moment; and that the people of the United States, in adopting that instrument have manifested a determination to shield themselves and their property from the effects

of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for people of each state.'

"'No state shall pass any bill of attainer, ex post facto law, or law impairing the obligation of contracts.'

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or gross subserviency to the Crown, or of violent political excitement; periods in which all nations are most liable (as well as free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.' Story, Com. par. 1344."

And again on p. 325:

"The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other

words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In Ex Parte Milligan, 71 U. S. 2, 18 L. ed. 281, Justice Davis in discussing the effect of the Constitution during war times, said, on p. 125:

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time,

was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus.

"It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this,

they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

In the recent case of Brown vs. Feldman, 256 U. S. 170, 65 L. ed. 877, Justice McKenna, said in the dissenting opinion:

"It is safer, saner and more consonant with constitutional pre-eminence and its purposes, to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, *or bend it to some impulse or emergency 'because of some accident of immediate overwhelming interest which appeals to the feelings, and distorts judgment.'* Northern Securities Co. vs. United States, 193 U. S. 197, 400, 48 L. ed. 679, 726."

NATURAL, INHERENT AND INALIENABLE RIGHTS.

> "Natural rights are such as appertain originally and essentially to man—such as are inherent in his nature—and which he enjoys as a man—independent of any particular effort on his side, as, for example, the right of providing for one's own preservation." Borden v. State, 11 Ark. (6 Eng.) 519, 527.

In discussing the constitutional meaning of inherent and inalienable rights, an eminent judge said, in State v. Phelps, 144 Wis. 1, 128 N. W. 1041, 1045:

> "Had the all-prevading concept of the declaration, which marked the change in our system of constitutional liberty, been from the first given the dignity that it commanded and has latterly received, instead of being regarded as in the nature of a rhetorical embellishment, or a sort of apostrophe to something sentimental rather than real, the very ideas which it was designed to entrench as fundamental law would not have been somewhat lost sight of.
>
> "Formerly, in general conception, there were no rights, strictly so-called. There were privileges which came directly or indirectly, by grace from soverign authority. That was the crowning mischief of the Colonial period which was sought to be removed. *Hence, at the start, things essential to our welfare which had been enjoyed so far as enjoyed at all, as privileges, were claimed as inherent rights, only surrenderable by the people, or subject to limitation by them by fundamental law.* There the standard was reared of a new era, one of inherent rights, instead of soverign graces. To emphasize and make that clear it was declared that all men are 'endowed with certain inalienable rights,' specifying some, but not attempting to specify them all.

"The word 'inalienable' was, doubless, not used in the strict sense, because some rights referred to were commonly parted with or modified by consent. Appreciating that, doubtless, in most constitutions, ours (Wisconsin) included, the term 'inherent' was substituted for inalienable, to denote, more accurately, the functional character of rights of members of a community in an unorganized state."

In discussing the right of the citizen to vote, the Court said on page 1045:

"That the right, in the beginning, here to participate in governmental affairs by reasonable exercise of the elective franchise, was inherent, within the meaning of the fundamental declaration in the Bill of Rights, seems pretty plain. Not inherent in the sense of inalienable and inseparable from the individual. Not natural in one view, but, inherent in the same sense as the right of self-defense and the right to acquire hold and transmit property are. *Thus, it is conventional in the sense other rights are which are in their nature absolute till surrendered or limited by consent, express or implied.* It is not natural in the sense that it is so absolute and functional as to be inseparable and not surrenderable."

* * * *

"It is often said by elementary writers that the right to vote is not a natural right; that it is a mere privilege which may be granted or not, or granted upon condition and when granted taken away or modified, all according to the discretion of the law-making power in the absense of express constitutional inhibition to the contrary. Few are found who have ventured to challenge the doctrine that the right to vote is more than a mere legislative privilege in the absence of a grant

in the fundamental law, which may not be strictly correct as it is generally understood.

"The idea that the right to vote is no more than a mere privilege was announced early as a justification for legislative interference therewith, and has been unqualifiedly reiterated over and over again and with growing emphasis as such interferences have progressed in severity. Thus it was said by a divided court in Healey vs. Wipe, etc., 22 S. D. 343, 117 N. W. 521. 'The election franchise is not a natural right. It is a privilege which may be taken away by the power that conferred it; and the only limitations upon the power of the Legislature to regulate its exercise and enjoyment are the express limitations found in the federal and state Constitutions'.

"The history of the subject shows that the idea is of foreign origin. It existed here prior to the Revolution under our then borrowed system. It is a relic of the old world systems. Thus it will be seen in Frieszleben vs. Shallcross, 9. Houst. (Del.) 1, Atl. 576, the court reasons from the prevailing ideas and conditions prior to 1776.

"*The difficulty seems to have been in failing to distinguish between fundamental limitations which the people, in forming a government, may place upon a right and the creation of the right itself. So the idea took root that,—the change from the old to the new system marked by the Declaration of Independence, the basic features of which have been incorporated into every written constitution in this country and in none more significantly than our own,—did not change the nature of those things which had been commonly the subject of unbridled legislative interference, as if they were the mere creatures of soverign authority.* So the idea persisted that the right in question, like the right to inherit and transmit property upon the death of its

possessor, was in no sense a natural or inherent right. Such idea has been reiterated over and over again and only been, if at all, doubtingly referred to now and then."

In Nunenacher vs. State, 129 Wis. 190, 108 N. W. 627, the question considered was whether or not the right to take property by will or inheritance was a statutory *right*. On this question, the court said, on page 628:

"The fallacy of the idea that the government creates or withholds property rights at will is very apparent. *Under our system the government is the creature of the people, the product of a social compact. The people in full possession of liberty and property come together and create a government to protect themselves, their liberty and their property. The government which they create becomes their agent; the officers their servants.* Under the theory of the North Carolina court these agents, in turn, create property rights and confer them upon their creators, who possessed these rights long before. The people create an agency to protect their existing rights which assumes to confer or withhold these same rights. But the question is chiefly historical. From the historical standpoint the idea that all rights of property and rights to transmit the same by inheritance or will have their origin in the positive enactments of law by an established government cannot stand the test. Governments have, indeed, from the earliest times, regulated the exercise of these rights, prescribed ways and forms for their exercise, and protected them by positive law; and so they do now. *From this universal exercise of the right of regulation the idea of governmental right to create and destroy may have arisen, but it seems more likely to have arisen from failure to keep in mind the radical difference between our republican theory of the origin of government and the European medieval theory. Our theory is*

that the people, in full possession of inalienable rights, form the government to protect those rights. The medieval idea was that the government was sent down from above, and that from its rights and privileges were allowed to flow in gracious streams to the people, who otherwise would not possess them.

"That there are inherent rights existing in the people prior to the making of any of our Constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state Constitution. Our own Constitution says in its very first article: 'All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights governments are instituted among men deriving their just powers from the consent of the governed.' Notice the language, 'to secure these (inherent) rights governments are instituted;' not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights. It is true that the inherent rights here referred to are not defined but are included under the very general terms of 'life, liberty and the pursuit of happiness." It is relatively easy to define 'life and liberty,' but it is apparent that the term 'pursuit of happiness' is a very comprehensive expression which covers a broad field. Unquestionably this expression covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To deny that there is such universal desire, or to deny that the fulfillment of this desire contributes to a large degree to the attainment of human happiness is to deny a fact as patent as

the shining of the sun at noonday. And so we find that however far we penetrate into the history of the remote past, this idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization. And so we also find that, from the very earliest times, men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants; and we find also that the right of the descendants, or some of them, to succeed to the ownership has been recognized from the dawn of human history. The birthright of the first born existed long before Esau sold his right to the wily Jacob, and the Mosaic law fairly bristles with provisions recognizing the right of inheritance as then long existing, and regulating its details. The most ancient known codes recognize it as a right already existing and Justice Brown was clearly right when he said, in U. S. vs. Perkins, 163 U. S. 625, 41 L. Ed. 287: 'The general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents'."

The right to study any language is a "natural right." The state did not create or grant the right to use language. The right to study and use language is one of the inherent rights referred to in the Declaration of Independence. The right to communicate with others through the spoken word is an inalienable right.

PUBLIC SCHOOLS.

When the Federal constitution was written there was not a public school in the United States. Education was then, as it had been for centuries in practically every civilized country, under private control. All schools were private and were maintained by those who patronized them. This applied not only to higher schools of learning, but also to the elementary and primary schools.

A few free schools existed in Massachusetts prior to the adoption of its constitution in 1780. Governor George Clinton in 1795 made a recommendation, as governor, that a common school system be adopted in New York. In 1797 a free school for negroes was founded in the city of New York. A free school for white children was founded in that city in 1801. The plan of supporting schools by levying taxes was first adopted in Massachusetts in 1800. The plan of having public free schools was started about 1800. History shows that about the same time America started maintaining free schools, England and some of the nations in continental Europe began to maintain free schools.

The common school system as we now have it was outlined by Horace Mann in 1837, and later on was enacted into law by the state of Massachusetts, and from then on it spread over the whole country.

The creation of public schools was not for the purpose of giving the state control of the subject of education. Its first object was to aid in the matter of educating the youth of our country. It was to supplement and assist the citizen in educating his children. It was to induce the people to make their private schools more efficient and useful. There

was no thought when public schools were first created of compelling children to attend public schools. The first compulsory school law was passed in Massachusetts in 1852. Its purpose was to compel parents to send their children to school. Not to the public school, to either a private or a public school. This exercise of the police power was to compel parents to give their children an opportunity to receive an elementary education.

The act in question is based on the assumption that because the state has the power to pass a compulsory school law that this gives the state complete control over the subject of education, and therefore, the state has the right and power to direct and control what shall be taught and what shall not be taught, not only in public schools, but also in private schools.

The exercise of the police power to compel parents to send their children to a primary school is a very different situation, than it is to use this police power to prohibit a parent from maintaining a private school or to prohibit a child from studying a foreign language in a private school.

If the act in question is a valid exercise of the police power, then the state has the right to abolish all private schools and require all children to attend the public schools. If the state has complete control of the subject of education, it can prescribe what courses of study, shall be pursued by those who shall attend public schools. It can make a course of study mandatory and prohibit the study of any subject not in the prescribed course of study.

Complete state control of education means community control. It means that we will socialize and nationalize the

subject of education. It will take from the citizen the right to control and direct the education of his child and turn it over to community control.

Applying the plan of the socialists to the important subject of education denies the individual liberty that is guaranteed by our constitution. The citizen has an inherent and an inalienable right to supervise, direct and control the education of his child. This includes the right to maintain private schools in which to teach his children. The state has no more power to forbid the study of an innocent and harmless subject than it has to forbid the child to eat a particular kind of food. If the state of Nebraska has power to prohibit the study of German in a private school, it can prohibit this same child from eating sauerkraut or weiner-worsts.

If the state has the power to socialize and control the entire subject of education, it can do the same thing over the home life of the citizen. It is a short step from prescribing and making exclusive a course of study in our schools to the making of an exclusive bill of fare to be used in our homes. If the state has the power to take complete control of the subject of education and do as the Spartans and Prussions did,—make the children the wards of the state,—the United States will be a dreary place in which to live, and liberty will be only a name.

The purpose of constitutional government is to preserve and protect the individual rights of the citizen. The constitution protects him in his right to own and use individual property—to have an individual home and to have sufficient individual liberty to study any useful subject.

Justice Bradley in discussing the effect of the 14th Amendment said in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835:

> "The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that 'No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. *It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.*"

It is difficult to conceive of a right more inherent or more inalienable than the right to study, unless it would be the right of parents to maintain a private school at their own expense in which to educate their children in the common branches, and to use this school to assist them in teaching religion and morality to their children. If there is an inherent and an inalienable right that is beyond the reach of the police power, it is the right of a parent to control and direct the education of his child.

PRIVATE SCHOOLS.

The intervenor and the plaintiffs herein have valuable property rights in these private schools. Having these

property rights in any other private property. The fact arbitrary exercise of the police power. Neither can they be deprived of this property by the enactment of regulations that will have the effect of prohibiting them from freely using their own property. The state has no right to deny or deprive educational institutions of their property rights. The property rights in private schools are the same as the propert yrights in any other private property. The fact that school property is devoted to a useful and necessary public purpose is an additional reason why those who have donated it should not be deprived of the property, or be made the victims of arbitrary and unreasonable regulations.

In discussing the property right in private educational institutions Judge Bradbury, in State vs. Neff. 52 Ohio State, 375 28 L. R. A. 409, said on p. 413:

> "We have seen that the statute under consideration has taken from the control and management of the Cincinnati College all of its property and placed it under the control and management of the University of Cincinnati. One ground, as we understand the argument of counsel, upon which this result is maintained to be lawful, is that the purpose to which this property was devoted by its original donors is a public purpose, and that that circumstance alone is sufficient to impress upon the property a public character; but if that is not so, yet as the purpose of the donors was not private gain, but public charity, and as the property under the new corporation would be applied to the same purpose to which the Cincinnati College would have applied it, had the latter continued its administration, that therefore, no substantial right, either of the original donors or of the corporation, was violated by the law."

* * * *

"The results of establishing this doctrine would be to place every elementary corporation within the state whether regilious, education, or created to administer to the wants of the suffering or needy, beyond the limits of constitutional protection. Whenever, in the opinion of a majority of the general assembly, the public interest, or the interest of two or more colleges, or churches, or other private eleemosynary corporations, required them to be united, the property of one or more of them could be seized and transferred to another. The doctrine finds no support in any treatise or adjudication within our knowledge, nor by reason of justice. There are two classes of public charities, one where the institutions are public in the broadest sense of that term, that is they are owned by the state, or some subdivision thereof created for governmental purposes, and maintained at the public expense. These institutions are absolutely under the control and management of the public through its proper representatives. As respects them no vested or private rights pertain. It does not follow, however, that because this class of public charitable institutions are the subjects of absolute public control, that another class, whose property consists of private donations and to which the organized public has contributed nothing, shall also be subjected to such absolute governmental control because the charity they administer has been christened a 'public charity in legal nomenclature. In common acceptation colleges are not 'charitable institutions' although in law they administer a public charity. This means no more than that the public are incidentally benefited by the education of some of its members, the immediate advantage accruing to the individual members who have received instruction.

"The unbroken current of authority declares that the property of such institutions is private property, and the corporations themselves private corporations. Dartmouth College Trustees vs. Woodward, 17 U. S.

4 Wheat. 518, 4 L. ed. 629; Vincennes University Trustees vs. Indiana, 55 U. S. 14 How. 269, 14 L. ed. 416; Yarmouth vs. North Yarmouth, 34 Me. 11, 56 Am. Dec. 666; Belfast Academy Trustees vs. Salmond, 11 Me. 114; Den. vs. Foy, 5 N. C. 58; State vs. Adams, 44 Mo. 570; Downing vs. Indiana State Board of Agriculture, 129 Ind. 443; Illinois Board of Education vs. Greenebaum, 39 Ill. 609; Illinois Board of Education vs. Bakewell, 122 Ill. 339; Montpelier Academy Trustees vs. George, 14 La. 395."

In Columbia Trust vs. Lincoln Institute, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53, the supreme court of Kentucky held that the voters could not prohibit the establishment, within the county limits, by a private charitable corporation, of an industrial school for colored children. In discussing this question, Chief Justice Baker said:

"It is useless to multiply authorities on so obvious a proposition. *If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether, or to authorize others to prohibit it, must be invalid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institution under discussion include the whole circle of the solid virtues of which youth may be endowed.* Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared policy of the Constitution. Section 183 provides: 'The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.' It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental

law,—the giving of every young man and woman in the commonwealth a sound education. And when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion unless it can be shown that education, supplemented by religious training, may be in some way evil to society? Does not the mind of every virtuous and right-thinking person at once admit that the contrary is true? *Do we not know that religious educational training has a tendency to make men more industrious, more virtuous, and better generally, morally, and physically? In other words, better, wiser, and more useful citizens. What would be thought of an act which prohibited the former from cultivating a piece of land greater than 75 acres, without the permission of his neighbors?... By what argument could an act be supported which prohibited a manufacturer from working more than a given number of artisans? And yet it is seriously contended that a school which seeks to make religious, upright, educated citizens may be prevented under the police power of the state as a public nuisance.* Education strengthens the mind, purifies the heart and widens the horizon of thought. It magnifies the domain of hope, multiplies the chances of success in life and opens wide the door of opportunity to the poor as well as to the rich. It makes men better husbands, better fathers, and better citizens. *It is not doubted that the legislature under the police power, may regulate education in many respects. It may prohibit the mingling of white and colored children in the same schools or in schools of immediate proximity. Perhaps, it may be within the police power to prohibit co-education of the sexes, or to, in any other reasonable way regulate the mere manner of educating the*

youth of the state; but to arbitrarily prohibit education is in direct violation of the Bill of Rights above quoted.

In the case of Berea College vs. Com. 123 Ky. 209, it was held, that it was within the power of the legislature to prohibit the voluntary mingling of white and colored students in the same school, it was not within its compentency to prohibit schools for white and colored students from being conducted within 25 miles of each other; it being there held that such a prohibition was an arbitrary exercise of power, which could not be upheld in a constitutional form of government. * * * *

"We conclude, then, on this branch of the case that religious and scientific education, instead of being in any wise injurious or dangerous to the public safety, morals, health or welfare, on the contrary, is promotive of public virtue, intelligence, and good citizenship, and is therefore to be desired and promoted, rather than prohibited or impeded; and this being true, the act under discussion, which puts it within the power of the voters of any precinct to prohibit the establishment of such a school as that contemplated by appellee, is unconstitutional, and therefore void."

In Berea College vs. Commonwealth of Kentucky, 211 U. S. 45, 53 L. ed. 81, the question passed on by this court was the right of the legislature to pass an act prohibiting domestic corporations from teaching white and negro children in the same institution. This court held that the state had power to limit the right of corporations, created by it to teach. Justice Brewer said, on p. 53:

"Besides, appellant, as a corporation, created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give it.

The state may withhold it altogether, or qualify it." The inference in the opinion is that the state did not have the power to prevent individuals from teaching, for the individual would have a natural right to teach. The court declined to pass on the question as to whether or not the state had a right to make it a crime to maintain or operate a private institution of learning where black and white children were received at the same time for instruction. In discussing this question, Justice Harlan in his dissenting opinion, said on page 67:

> "In my judgment the court should directly meet and decide the broad question presented by the statute. *It should adjudge whether the statute, as a whole is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction.* In the view which I have as my duty I feel obliged to express my opinion as to the validity of the act as a whole. *I am of the opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and is, therefore, void.*
>
> "*The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interefered with by government,*—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. *The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States.*

This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' Allegeyer vs. Louisiana, 165 U. S. 578, 41 L. ed. 832. If pupils, of whatever race,—certainly, if they be free citizens,—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In these cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. *Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the*

public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. *Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectfully. Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinction between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?* Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the michievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

"Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is, in my opinion, made an essential element in the policy of the statute, and, if regard be had to the object and pur-

pose of this legislation, it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void; otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of white and black pupils, at the same time, even in a *private* institution, is a crime against that commonwealth, punishable by fine and imprisonment."

THE CONSTITUTION SHOULD PROTECT PRIVATE EDUCATION.

Section 4 of Art. I of the Bill of Rights of Nebraska is as follows:

> "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. *Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.*"

The last sentence quoted above is taken from the Ordinance of 1787 which created the Northwest Territory. At the time those words were included in that ordinance, there were no public schools in the proposed Northwest Territory, or in the United States. The schools referred to therein are *private schools*, the *means of instruction* referred to therein is *private instruction* given by private teachers.

The right of the state to maintain an educational system is unquestioned. It has power, under different provisions in the constitution, to create and maintain a public school system. It does not have power to make a public

school system exclusive or to prohibit private schools. The right of the individual citizen to educate his child in a private school is a constitutional right that can not be taken away by the police power. The constitution prevents the legislature from interfering with private education. The legislature has no power to prohibit the teaching of a useful subject in a private school. Not only is it prohibited from doing this, but the constitution directs the the legislature *to encourage schools and means of instruction.* Instead of the state having the power to prohibit, there is a mandatory provision in the constitution which requires it acting through the legislature, *to encourage private schools and private instruction.*

Parochial schools are a part of the religious life of Catholics and Lutherans. These schools are built, maintained and supported for the purpose of giving instruction in religion and morality, in addition to the regular course of study in the secular branches. Teachers in these parochial schools have the same qualifications as the teachers in the public schools. The course of study is substantially the equivalent of the course of study in the public schools. In addition to this course of study, instructions are given in religion and morality. These parochial schools are to supplement the religious training given to the children in their homes by their parents. Naturally, if a foreign language is used in the home as a medium of communication, this same language can be used to advantage in a parochial school to assist the child in learning the English language and also as a medium through which it receives instruction until it is able to understand the English language. If the language used by a mother in the home is German, or any other foreign language, it naturally follows that the mother,

in giving religious instruction to her child, uses that language. To prevent the parochial schools from using this same language to instruct this child is to deny the equal protection of the laws to the children that happen to live in foreign language homes.

The mother who speaks English gives religious instruction to her child in the English language. That mother has a right to have this work supplemented in a private school in the English language. The mother who gives instruction to her child in Polish in the home, has the same right as the mother who speaks English, to have her child instructed in the language of the home, Polish, in a private school.

The children of the intervenor Siedlik can not receive instruction in St. Francis school until they have sufficient knowledge of the English language to receive instruction in that language. This fact was established at the trial without conflict. It is admited in the brief of the state that the child cannot receive religious instruction in the school in any language but English. It has been proved, without conflict, that one of the Siedlik children lost a year's schooling because the teachers in that school, after the law under consideration was passed, did not use Polish as a means of communicating with the child.

Citation of court decisions and arguments are not necessary to prove that children who use the Polish language exclusively in their homes, and know no other language in their home life, can make little progress in a school where the instruction is confined exclusively to English. Common sense and sensible administration suggest both the propriety and the necessity of using whatever means of com-

munication are open to these children. To prohibit from using the language of the home in a private school is not only unconstitutional, but is tyrannical.

The state has admitted in its brief that the law in question does prevent the giving of religious instruction in private schools, to those who do not understand the English language. This admission in itself is sufficient reason why the act under consideration should be declared unconstitutional.

POLICE POWER VS. THE CONSTITUTION.

The founders of our government had a definite idea of their citizenship. They planned to protect the natural and inherent rights of the citizen by a written constitution. They thought that in the United States men would be freer than elsewhere. They had a dislike for any system which marked a man superior to another, in spite of character, qualifications and attainments. They were opposed to the European theory of government that made the citizen a government ridden vassal. Their conception was that the prime purpose of the state was not to take rights away from the citizen, but rather to protect him in his rights, even as against those who happened to be administering the government. Their plan was to govern as little as possible.

In the beginning, a decent, honest citizen had no law and no government to bother him. He was free to live his life in his own way. He had freedom of thought, freedom of the person, and freedom in his home. He could study whatever pleased or interested him and say whatever he desired on any subject at any time or place. He

was a free man and he thought that his liberty was the distinctive feature of the citizenship of this country. His liberty meant more than the privilege of agreeing with the majority. He understood that it was this liberty that made our country the asylum for all those who had been denied these fundamental rights in other parts of the world.

As soon as the fathers created constitutional liberty, the legislative branch began to limit and take it away through the exercise of the police power. Acts *mala in se* were such when the constitution was written. As a rule these acts were wrongs before the state declared them to be such. They were violation of the divine and natural law.

Acts *mala prohibita* are the result of legislative activity. By the exercise of the police power, innocent and harmless acts are made unlawful. Most of these police regulations deprive the citizen of liberty; as a rule, they are passed without regard to public sentiment and therefore cannot be enforced. Because of this, America has failed to properly and efficiently enforce its criminal laws.

While we have failed to effectively enforce our criminal laws, against real crimes,—*acts mala in se*,—our congress, every state legislature, every city council, every village board, and every other body that has express or implied power to legislate is busy devising ways to make innocent and innocuous acts unlawful.

The demagogue is busy suggesting to the ignorant and thoughtless that our courts, should not exercise the power of declaring legislative acts unconstitutional. It is sug-

gested that the legislative act is the voice of the people. It is assumed that America speaks only through its legislative and executive branches. The thoughtless overlook the fact that the courts were created by the people, in the same way as the other co-ordinate branches of the government. The courts are as much the voice of the people as are the other branches of government. When the court declares a legislative act unconstitutional, the people speak throught he court,—the people express themselves through the only agency ever created by them, and given power to interpret and pass on the constitutionality of legislation.

It is well within the facts to say that the clamor against the right and power of courts to nullify legislative acts because of their unconstitutionality, has had an effect on the courts. The opinions disclose that the courts have been busy finding new reasons and making ingenious arguments to sustain legislation. Some courts have even gone to the extreme limit of declaring that the wisdom, policy and reasonableness of police regulations is exclusively a legislative question. In many cases, the opinions in which acts have been declared unconstitutional take the form of an apology. The trend of affairs is such that there is substantial reason to ask the question that was propounded by Justice McKenna in Block vs. Hirsh, 256 U. S. 135, 163; 65 L. ed. 865, 874:

> "Has it (the constitution) suddenly become weak—become not a restraint upon evil government, but an impediment to good government? Has it become an anachronism, and is it to become 'an archaeological relic,' no longer to be an efficient factor in affairs, but something only to engage and entertain the studies of antiquarians?"

LIBERTY AND PROPERTY.

The act in question is based on the theory of state paternalism,—that mediœaval doctrine that proposes to effect the social and individual elevation of man by restraining him from exercising freedom over the education of his children. It assumes that the citizen is a sort of half infant, who must be guarded and led along, in order that he may not injure the state. The act in question does not benefit any individual. It is not claimed that the study of a foreign language in a private school will injure or cause damage to anyone. This act prohibits children from studying a language at the time of life when they can learn it most easily. Just how the state will be benefited by prohibiting the study of foreign languages below the eighth grade and permitting the study of these languages above the eighth grade in our schools has not been explained. Probably the reason is the same as that given by the Pharoahs of ancient Egypt, when they required their subjects "to make bricks without straw."

The liberty guaranteed by the 14th amendment has been held to protect against state denial; the right of an employer to discriminate against a workman because he is a member of a trade union (Coppage vs. Kansas, 236 U. S. 1, 59 L. ed. 441); the right of a business man to conduct a private employment agency (Adams vs. Tanner, 244 U. S. 590, 61 L. ed. 1336); the right to contract, outside the state, for insurance on the property of a citizen (Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. ed. 832). In each of the foregoing, the state legislature deemed the proposed legislation as necessary and not inimical to the public welfare. These acts were declared unconstitutional because they

interfered with the liberty of the citizen in the matter of making contracts regarding his property and his property rights.

In comparison, freedom of the person and freedom of the mind,—liberty in its most comprehensive sense,—is more important than the right to own and use property. Of what avail is the liberty of the person and the possession of property, if the state places fetters on the human mind? The provisions of the 14th amendment not only guarantee liberty to use and own property and to be free from physical restraint, but also mental liberty.

Respectfully submitted,

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Omaha, Nebraska,

February 14, 1923.

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END

OF

CASE